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TCEQ DOCKET NUMBER 2007-0490-MIS-U

APPEAL OF NEGATIVE	§	BEFORE THE
USE DETERMINATION	§	
ISSUED TO BJ SERVICES	§	TEXAS COMMISSION ON
COMPANY, USA ON	§	
APPLICATION NUMBER 06-10292	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO APPEAL OF USE DETERMINATION

The Executive Director ("ED") of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to the Appeal of the Executive Director's Use Determination filed by W. Ted Clark, UHY Advisors SALT, LLC on behalf of BJ Services Company, USA (Appellant) on March 28, 2007. For the reasons described below, the ED respectfully requests that the Commission deny the appeal and uphold the ED's use determination.

PROGRAM BACKGROUND

In 1993, the citizens of Texas voted to adopt a tax measure called Proposition 2. Proposition 2 was implemented when Article VIII, § 1-1 was added to the Texas Constitution on November 2, 1993. The new amendment allowed the legislature to "exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution."

The Texas Legislature codified the new amendment in 1993 as TEX. TAX CODE § 11.31 (effective January 1, 1994). The new statute mirrored the language of Article VIII, § 1-1. In 2001, the legislature amended § 11.31 when it passed H.B. 3121 (effective September 1, 2001). This bill added several new procedural requirements to § 11.31, including a provision requiring the establishment and implementation of a process to appeal use determinations. See TEX. TAX CODE § 11.31(e). The amendment also required the Commission to adopt new rules establishing specific standards for the Executive Director to follow in making use determinations for property that qualified for both full and partial determinations. See TEX. TAX CODE § 11.31(g).

Appeals under 30 TAC § 17.25 may be filed by either the applicant seeking the determination, or by the chief appraiser of the tax appraisal district affected by the determination. TEX. TAX CODE § 11.31(e); 30 TAC § 17.25(a)(2). Appellants are required by 30 TAC § 17.25(b)(5) to explain the basis for the appeal.

PROCEDURAL BACKGROUND

Use Determination 06-10292:

On February 9, 2007, BJ Services Company, USA (Appellant) filed a Tier I application with the TCEQ, seeking a use determination under TEX. TAX CODE § 11.31 for property and equipment associated with a research lab and oil field vehicle assembly facility. The application was declared administratively complete on February 13, 2007. The ED completed a technical review of the application and on March 6, 2007 issued 14 positive use determinations and three negative use determinations on the property and equipment listed in the application.

On March 28, 2007, the TCEQ received an appeal to the negative use determination for the self contained air recirculation system from W. Ted Clark, UHY Advisors SALT, LLC on behalf of BJ Services Company, USA.

LEGAL ANALYSIS

Appellant's Claims

In support of the appeal of the ED's negative use determination, the Appellant asserts that the self contained air recirculation system was classified improperly as safety property. The Appellant claims that the system constitutes pollution control property. The application describes the equipment at issue as "Self contained air recirculation system dor [sic] labs. Air recirculates through the labs every 60 seconds into a controlled system and tied to emergency control devise." The application cites 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, and lists the Pre-Determined Equipment List Number for the equipment as A-90. The Pre-Determined Equipment List states that such equipment consists of "Hoods and Collection Systems for Final Control Devices". The Pre-Determined Equipment List further describes the equipment as "piping, headers, pumps, hoods, ducts, etc. -- used to collect air contaminants and route them to a control device."

ED's Response

The ED urges the Commission to deny the appeal and affirm the negative use determination. First, the equipment at issue is properly described as safety equipment rather than pollution control equipment. The application states that air is recirculated through the labs into a controlled system every 60 seconds and is connected to an emergency control device. The logical conclusion from this statement is that the equipment is operated to protect those working in the labs. The application does not provide a basis, either explicitly or implicitly, for concluding that the equipment affects air emissions from the facility. Therefore, the air recirculation system cannot be considered pollution control property within the meaning of TEX. TAX CODE § 11.31.

Second, the equipment is not listed on the Pre-Determined Equipment List. The application states that air is recirculated into a controlled system. However, this is insufficient to establish that air contaminants are actually collected and routed to a pollution control device, which is different from a safety control device. The application does not state whether the system is able to purify the air or safely store or dispose of the contaminants in a manner that would affect emissions from the facility. The reasonable conclusion reached from the information provided in the application is that the equipment merely circulates the air in order to protect those working in the labs, but does not collect the contaminants and route them to a control device, as specified under A-90 in Appendix A to *Property Tax Exemptions for Pollution Control Property*.

Third, the installation of the equipment must result in an environmental benefit at the site. Figure 30 TAC § 17.15, Prop 2 Decision Flow Chart, states that "[i]f an environmental benefit at the site can not be identified, the property is not eligible for a positive use determination." In this instance, from the information provided, it does not appear that any environmental benefit is derived from the operation of the air recirculation system. Specifically, the application does not describe how, if at all, emissions from the facility are abated.

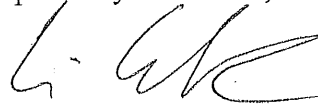
Fourth, the equipment was not installed to meet or exceed an environmental law. Figure 30 TAC § 17.15, Prop 2 Decision Flow Chart, states that "[i]f an adopted state, local, or federal environmental regulation, rule, or law can not be identified the property is not eligible for a positive use determination." The application cites 30 TAC Chapter 116 as the relevant environmental law. However, this citation is insufficient because it lacks the specificity necessary to determine exactly which rule in Chapter 116 is being met or exceeded. Further, it is unclear which rule within 30 TAC Chapter 116 would address indoor air pollution.

CONCLUSION

After careful consideration of the appeal filed by the Appellant regarding the ED's negative use determination issued on the self contained air recirculation system listed in the Tier I application numbered 06-10292, the ED concludes that the original negative use determination issued to the Appellant was not given in error. The Appellant failed to provide any legal basis upon which a reversal of the ED's use determination may be made. The Appellant's allegation that the equipment was improperly classified does not alter the findings and the final negative use determination issued by the ED, pursuant to the terms and mandates set forth in relevant law and rules. Therefore, the ED respectfully requests that the Commission:

1. Deny the appeal filed by W. Ted Clark, UHY Advisors SALT, LLC on behalf of BJ Services Company, USA; and
2. Uphold the ED's negative use determination issued on the self-contained air recirculation system listed in application numbered 06-10292.

Respectfully submitted,



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CERTIFICATE OF SERVICE

On the 14th day of May, 2007, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, or hand delivery.

By 

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